Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-260

L. N. McDONALD and RAYMOND L. LAIRD,
Petitioners

v.

SANTA FE TRANSPORTATION COMPANY and TEAMSTERS FREIGHT, TANK LINE AND AUTOMOBILE INDUSTRY EMPLOYEES, LOCAL UNION NO. 988,
Respondents

BRIEF OF LOCAL UNION NO. 988 IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BRIEF OF LOCAL UNION NO. 988 IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

This brief in opposition to the granting of a writ of certiorari is filed on behalf of Respondent, Teamsters Freight, Tank Line and Automobile Industry Employees, Local Union No. 988. The other Respondent, Santa Fe Transportation Company, will file its own separate response.

QUESTIONS PRESENTED

1. Whether in administering punishment in a specific episode of theft of an employer's property by three employees, the employer's dismissal of two white employees while not dismissing a similarly charged black employee raises a claim under Title VII of the Civil Rights Act of 1974, as amended, 42 U.S.C. §§ 2000e, *et seq.*

2. Whether white employees who were discharged for alleged misappropriation of company property when a similarly charged black employee was not discharged, have standing to sue under the Civil Rights Act of 1866, 42 U.S.C. § 1981.

However, even accepting Petitioner's articulation of the "Questions Presented", Respondent Union advises the Court that the judgment in its favor against Petitioner Laird is adequately based upon other alternative grounds. As a foreman, Petitioner Laird was neither a member of the bargaining unit covered by the collective bargaining contract nor a member of the Union; therefore, no question is raised by him against the Union under either Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e, *et seq.*, or the Civil Rights Act of 1866, 42 U.S.C. § 1981.

STATEMENT OF THE CASE

This Respondent supplements and corrects Petitioners' Statement of the Case as follows:

Following more than two and one-half years of pretrial activity, including motions to dismiss, pretrial conferences, and discovery proceedings, the District Court concluded that the action could not be maintained as a class action

since the number of white persons who may be terminated upon charges of misappropriating company property does not satisfy the numerosity requirement of Rule 23. (Appendix to Petition, p. 25) This factual determination and consequent legal conclusion was not challenged below.

During this period, the District Court filed three memorandum opinions, on January 4, 1974, May 2, 1974 and June 13, 1974, in which it interpreted Petitioners' pleadings and contentions to be that Petitioners were "equally guilty" of theft of the employer's property in comparison with a Negro employee who was not discharged (Appendix to Petition, p. 36) and that

> "[t]he pleadings of plaintiffs do not allege that they were falsely charged with misappropriating company property; the substance of the allegations is that plaintiffs take issue with the fact that they were discharged for such conduct while a similarly charged Negro employee was not discharged". Appendix to Petition, pp. 33 and 28.

The District Court was also advised by the parties that Petitioner McDonald's discharge was taken to arbitration by the Union where the discharge was upheld, although the Court property declined to accord finality to the arbitration award for Title VII purposes. (Appendix to Petition, pp. 27 and 32; See also Petitioners' Brief in the Court of Appeals, p. 4)[1]

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1. Petitioners' Brief in the Court of Appeals states at page 4: "On October 2, 1970, L. N. McDonald filed a grievance with Local Union No. 988, and a hearing on the grievance was held before the Southern Area Multi-State Grievance Committee commencing at 9:00 A.M., Monday, October 10, 1970, at the Ramada Inn, West Beach, Biloxi, Mississippi, Case No. 58."

The posture of the case below does not, in this Respondent's view, accommodate the claim of Petitioners that they were not afforded an opportunity by the District Court to offer evidence that they were innocent of the accusations. Petitioners did not by requesting leave to sharpen their pleadings or by any other means advise the District Court or the Court of Appeals that the gravamen of their claim was innocence or that the District Court misunderstood their posture. If they had done so, the Title VII aspect of the case might well have faded away, and the arbitration award would likely have been elevated to a final and binding disposition under the collective bargaining contract, adjudicating as it did the simple question of Petitioner McDonald's guilt or innocence of theft.

In the view of this Respondent, therefore, this appeal comes to the Supreme Court as a case involving a claim of equal complicity by three employees in an episode of theft of an employer's property followed by the employer's imposition of disparate discipline against two white employees in comparison to a Negro employee involved in the affair.

Theft of company property of over $200 is a felony under the Texas Penal Code.[2]

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2. The theft charge involved 10 cases of anti-freeze which Petitioner McDonald was accused of stealing from trailer 20438. McDonald stated in his grievance that a shipping clerk at "S.M.S." told him to do what he like with "some anti-freeze over on trailer 20438," that he so informed Petitioner Laird, "my supervisor," and that Laird told him "what to do with this anti-freeze." See Appendix to Petition, pp. 50-51.

Texas Penal Code Article 31.03, Vernon's Texas Codes Annotated-Penal, provides that theft of property valued at $200 or more is "a felony of the third degree" which is punishable by confinement in the State penitentiary for not less than 2 nor more than 10 years under Article 12.34 of the Penal Code.

REASONS FOR DENYING THE WRIT

1. This case involves an *ad hoc* decision by an employer in dealing with an isolated episode of felony theft by three employees. An employer's sifting of the facts and circumstances surrounding each of the employees and its assessment of the relative culpability and appropriate punishment of each is normally a unique judgment that would rarely be decisive of other cases. This case does not involve any general policy of the employer or the Union. There is no claim that the administration of this case by Respondents is part of a pattern or policy of discharge for theft, either in this company or in industry generally. Fortunately, there could be no serious claim of significant frequency or recurrence of theft on the job in industry generally. Thus, this holding below is of limited significance which does not merit review by this Court.

2. Another peculiarity of the case is the circumstance that Petitioner Laird was a supervisor while the undischarged Negro employee was a nonsupervisory workman and member of the bargaining unit. To what extent is an employer required by Title VII to administer equal discipline for felony theft as between employees of entirely different status, responsibility and trust in the company's administrative organization? At most, the Title VII problem which Petitioner Laird seeks to kindle is highly unusual.

3. Insofar as Petitioner McDonald seeks to emphasize initially in this Court an assertion of innocence, we have here an additional twist that the Union did take the case to arbitration before the contractual Multi-State Grievance Committee which sustained the employer's discharge of

this employee. The federal policy favoring the settlement of labor disputes through arbitration and the federal policy against employment discrimination combine to permit an employee to pursue fully both arbitration and his cause of action under Title VII, *Alexander v. Gardner-Denver Company*, 415 U.S. 36 (1974) but Respondent suggests that this option to pursue both remedies does not obtain if the employee's claim is purely a matter of guilt or innocence of theft and the arbitration decision has been adverse to him. In the latter case, the adverse arbitration award is binding. If the claim of innocence as distinguished from the claim of discriminatory discipline had been seriously urged in the District Court, Petitioner McDonald might well have found himself barred by the finality of the arbitration award.

4. The imposition of equal punishment to all participants in a particular episode of felony theft of an employer's property is not a requirement of Title VII. The intention of Congress was to remove "artificial, arbitrary and unreasonable barriers to employment", *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 806 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431. Selective punishment of employees involved in a particular episode of felony theft of company property is not part and parcel of "discriminatory practices or devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *Griggs v. Duke Power Co., supra*, 401 U.S. at 429. In *McDonnell Douglas Corporation v. Green, supra*, this Court declared that

> "Nothing in Title VII compels an employer to absolve and rehire one who has engaged in . . . deliberate unlawful activity against it", 401 U.S. at 803.

The Court also made clear that the principles of *N.L.R.B. v. Fansteel Corp.*, 306 U.S. 240 (1939), are pertinent to a Title VII action. In *Fansteel*, the Court set aside an N.L.R.B. reinstatement of sit-down strikers even though the strike was an unfair labor practice strike which had resulted from "reprehensible" illegal employer conduct and even though the employer there did not discharge other sit-down strikers of equal guilt. Because of the severe misconduct involved in *Fansteel*, the Court honored the right of the employer to discharge some while retaining others. 306 U.S. at 259.

In this case, the Court of Appeals, noting that there was no allegation that Petitioners were "falsely" charged with misappropriating company property, affirmed *per curiam*, holding that "disciplinary action for offenses not constituting crimes is not involved in this case." (Appendix to Petition, pp. 22-23) It thus applied the *McDonnell* and *Fansteel* decisions by excluding from Title VII this very limited but very appropriate situation. It excluded only "disciplinary action" in a particular episode of the crime of theft committed against an employer.

In this connection, it should be noted that the case, as a theft case, is even more removed from the area of statutory regulation of employment conditions than *McDonnell* and *Fansteel*. In those cases the employees' unlawful conduct was motivated by high principle and unselfish objective, related to hire and conditions of employment, although it was excessively militant. Here, the case is ugly, serious theft. It would not promote the valued purposes of Title VII to put federal courts into factual re-examination of the discipline imposed in each particular episode of theft. On the other hand, if disparity should later arise from the development of widespread

practices or rules concerning the administration of discipline in theft cases, which practices or rules seem to work disproportionately or unfairly against any race, then this Court will, no doubt, grant appropriate review to consider the competing social values in the situation.

5. As to 42 U.S.C. § 1981, derived from the Civil Rights Act of 1866, there has been no deviation from the principles already established by this Court under the companion 42 U.S.C. § 1982.

In *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 235, 237 (1969), a white property owner was held to have standing under 42 U.S.C. § 1982 to sue for the redress of damages inflicted upon him because of his effort to uphold the right of a Negro to rent and enjoy the white person's property in an all-white neighborhood. The same holding was made earlier in a restrictive covenant case under the Fourteenth Amendment in *Barrow v. Jackson*, 346 U.S. 249, 259 (1953). In both cases this Court upheld the standing of white litigants to vindicate the rights of others—"non-Caucasians" in *Barrow v. Jackson, supra*, 346 U.S. at 259-260, and "minorities protected by § 1982" in *Sullivan v. Little Hunting Park, supra*, 396 U.S. at 237.[3]

These contours of standing under 42 U.S.C. § 1982 were followed by the Second Circuit in *De Matteis v.*

3. In a § 1982 case somewhat more removed from direct vindication of the rights of black persons by a white, this Court expressly reserved ruling. Trafficante v. Metropolitan Life Insurance Company, 409 U.S. 205, 209 n. 8 (1973). There the Ninth Circuit held a white and a black person who were not themselves deprived of the right to rent or purchase property had no standing under § 1982 to sue on account of a landlord's policy of excluding black persons from a housing project thereby depriving plaintiffs of the benefit of living in an integrated community. 466 F.2d 1158 (9th Cir. 1972)

Eastman Kodak Co., 511 F.2d 206, 311-312 (2nd Cir. 1975) and the cause of action was upheld under § 1981 where plaintiff was forced into premature retirement by his employer, Kodak, because he sold his house, located in a neighborhood inhabited primarily by white Kodak employees, to a black fellow-employee.

But where white persons have sued under § 1981 solely for the vindication of their own rights, the statute has been held unavailable. *Perkins v. Banster*, 190 F.Supp. 98 (D. Md.), aff'd, 285 F.2d 426 (4th Cir. 1960). The Eighth Circuit pointedly declined to affirm a contrary holding in *Gannon v. Action*, 450 F.2d 1227 (8th Cir. 1971) affirming in part and remanding in part, 303 F. Supp. 1240 (E.D. Mo. 1969).

The opinion below is in accord with this Court's holdings under § 1982 and with the holdings of the Second, Fourth and Eighth Circuits under § 1981. There is no lack of unanimity in the Courts of Appeals.

Petitioner's plea for parallel liberal treatment of §§ 1981 and 1982 is not apropos. Petitioner's real objective is to obtain new and enlarged application of § 1981 (and presumably § 1982) to protect the rights of white persons against black persons, a difficult feat since both sections assure the right of all persons to have the same rights as "white citizens."

The need to strain for this result, if it ever existed in a predominantly white nation, has abated since the passage of Title VII which admittedly does assure equal employment opportunities of all races and ethnic groups and which is available to white persons who deem themselves aggrieved by discriminatory preferences for blacks. Title VII has the advantage of channeling such competing

claims through the Equal Employment Opportunity Commission where, at least, an initial and informed judgment can be made by a qualified agency to establish a proper balance between competing claims of diverse races and ethnic groups. On the other hand, the enlargement of § 1981 as Petitioners suggest, might have the result of encouraging obstructive or dilatory litigation under § 1981 by persons disgruntled by the adverse effect of some of the Title VII remedies now being implemented. At least this prospect deserves consideration before Petitioners' suggestions are accepted.

CONCLUSION

For these reasons, the writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of September, A.D. 1975, three copies of the foregoing Brief in Opposition to Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit were mailed, postage prepaid, to Messrs. Stuart M. Nelkin, Henry Rosenblum and Robert B. O'Keefe, 4635 Southwest Freeway, Suite 320 West, Houston, Texas 77027, and to Mr. Benjamin R. Powel, 808 Sealy & Smith Professional Building, P. O. Box 629, Galveston, Texas 77550, who are all parties required to be served.

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